

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE MARIO HERNANDEZ	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
et al.	:	NO. 10-383

O R D E R

The petitioner, proceeding *pro se*, filed a petition for a writ of *habeas corpus*, which was referred to Magistrate Judge Rice for preparation of a report and recommendation. After Magistrate Judge Rice issued the report and recommendation, the petitioner filed a notice of appeal to the Third Circuit instead of filing objections to the report and recommendation. The Third Circuit dismissed the appeal for lack of jurisdiction, as no final judgment had been entered by this Court. The petitioner then was given an opportunity to file any objections to the report and recommendation, and filed a document entitled "Motion to Change Habeas Corpus into a PCRA Relief Threshold Matter-of-Timeliness."

As explained by Magistrate Judge Rice in the Report and Recommendation, the petitioner did not file a PRCA petition in the state court, although he did file a *habeas corpus* petition directly in the Pennsylvania Supreme Court that was summarily denied. The petition filed in this Court was untimely even if the limitations period were tolled during the pendency of the Pennsylvania Supreme Court petition (but the period was not

tolled because that petition was not a properly filed collateral petition). This Court expresses no opinion on whether the petitioner can seek redress from the Pennsylvania state courts, but the petition in this Court was filed too late.

AND NOW, this {th day of November 2010, upon consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, IT IS ORDERED:

1. That the "Motion to Change Habeas Corpus into a PCRA Relief Threshold Matter-of-Timeliness" is DENIED.

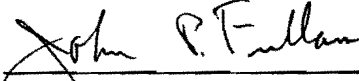
2. That the Report and Recommendation is APPROVED AND ADOPTED.

3. That the petition for a writ of *habeas corpus* is DENIED with prejudice.

4. That there is no probable cause to issue a certificate of appealability.

5. That the Clerk of Court shall mark the case-file CLOSED.

BY THE COURT:



John P. Fullam, Sr. J.